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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 9, Original

UNITED STATES OF AMERICA,
Plaintiff,

vs.

STATE OF LOUISIANA, ET AL.,
Defendant.

SUPPLEMENTAL REPORT OF WALTER P. ARMSTRONG, JR., SPECIAL MASTER

August 27, 1979

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SUPPLEMENTAL REPORT OF WALTER P. ARMSTRONG, JR., SPECIAL MASTER

PREFATORY

In the order approving the original report of the Special Master (420 U.S. 529) the Court provided as follows:

> "The parties are directed to prepare and file a decree, for entry by this Court, establishing 'a base from which the extent of the territorial waters under the jurisdiction of the State of Louisiana pursuant to the Submerged Lands Act can be measured'. Report of the Special Master 53. If the parties cannot agree upon the form of the decree, then they shall refer any remaining disputes to the Special Master for his recommendations. In the event of such a referral, the Special Master is authorized to hold such hearings, take such evidence, and conduct such proceedings as he may deem appropriate and in due course, to report his recommendations to this Court."

Such a decree was prepared and entered (422 U.S. 13) without the necessity for intervention by the Special

Master. This decree also provided for the rendering and filing with the Court of certain accountings as therein provided. These accountings and objections thereto[1] were duly made and filed, whereupon the Court referred them to the Special Master (423 U.S. 909). It is upon this reference that the present supplemental report is made.

Following the reference to the Special Master on October 20, 1975, the parties attempted to reconcile the differences which existed between them, primarily through correspondence and a conference between their respective technical staffs held on February 26 and 27, 1976. On May 4, 1976 a pre-trial conference was held at Memphis, Tennessee, the results of which were embodied in a pre-trial order entered May 26, 1976, which recites the agreements reached by the parties and states the unresolved issues as follows:

"(1) Whether the United States is obligated to account either for the value of the use of the State's share of the escrowed[2] funds or for interest on the funds.

1.

(a) Louisiana Unimpounded Fund Accounting, filed August 15, 1975;

(b) Louisiana Impounded Fund Accounting, filed September 15, 1975;

(c) United States Unimpounded Fund Accounting, filed August 25, 1975;

(d) United States Impounded Fund Accounting, filed September 15, 1975;

(e) United States Objections to Louisiana Unimpounded Fund Accounting, filed October 15, 1975;

(f) Louisiana Objections to United States Unimpounded and Impounded Fund Accounting, filed October 22, 1975. (Although filed two days after the order of reference these are taken as included therein.)

2. Although the term "escrowed" is used in the order, which was approved by counsel as to form, the reference is obviously to funds "impounded" under the Interim Agreement of October 12, 1956.

(2) Whether Louisiana has the obligation to account for severance taxes in its unimpounded fund accountings.

(3) Whether Louisiana has the obligation to account for revenues received from the area formerly constituting Zone 1 established by the interim agreement of October 12, 1956."

Thereafter on June 6, 1976 a stipulation was entered into between the parties pursuant to which supplemental and amended accountings and objections thereto[3] were filed by each of the parties.

On July 25, 1977 a further Pre-Trial Conference was held in Memphis, Tennessee, as a result of which a Supplemental Pre-Trial Order was entered on August 12, 1977, pursuant to which evidentiary hearings on the unresolved issues were held at Memphis, Tennessee on November 14, 15, and 16, 1977 and on March 28, 1978. Thereafter

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3.

(a) United States Supplemental Impounded Fund Accounting filed June 23, 1976

(b) United States Corrected Unimpounded Fund Accounting filed May 23, 1976

(c) Louisiana Objections to United States Supplemental Impounded Fund Accounting filed July 21, 1976

(d) Louisiana Objections to United States Corrected Unimpounded Fund Accounting filed July 22, 1976

(e) United States Split Lease Accounting filed August 23, 1976

(f) Louisiana Split Lease Accounting filed August 23, 1976

(g) Louisiana Objections to United States Split Lease Accounting filed October 21, 1976

(h) United States Objections to Louisiana Split Lease Accounting filed October 26, 1976

(i) Amended Split Lease Accounting Exhibits filed by both parties February 17-18, 1977

(j) Stipulation as to Split Lease Accountings filed July 25, 1977 resolving all technical objections

the matter was thoroughly briefed and oral argument presented before the Special Master in New Orleans on February 20, 1979. It is upon the basis of this evidence and the arguments based upon it that the following findings and recommendations are made.

First Issue

Is the United States obligated to account for and pay to the State of Louisiana either the value of the use of Louisiana's share of the impounded funds or interest upon that portion of those funds?

On October 12, 1956, the parties entered into an Interim Agreement under which the submerged lands lying offshore of the southern boundary of the State of Louisiana were divided into four zones as therein described, that contiguous to the coastline being designated as Zone 1, the next most seaward as Zone 2, the next as Zone 3, and the most seaward as Zone 4. Under this agreement the United States agreed (with certain exclusions not here material) "to impound in a separate fund in the Treasury of the United States a sum equal to all bonuses, rentals, royalties or other payments heretofore or hereafter paid to it for and on account of each lease, or part thereof, in Zones 2 and 3, being the disputed area," at such time as said leases became subject to the agreement as therein provided.

The Interim Agreement further provides that "the impounded funds provided for herein shall be held intact, in a separate account for each lease or portion thereof affected, by each party until title to the area affected is determined. Whereupon, except as otherwise herein provided: - - -

(b) Any funds derived from an area finally determined to be owned by the State of Louisiana" (with an

exception not here material) "shall be taken from the separate and impounded fund in the Treasury of the United States" and paid to the appropriate officer of the State of Louisiana.

The ownership of lands in the disputed area (Zones 2 and 3) has now been settled by decree of the Court (422 U.S. 13), accountings have been filed by each of the parties, and payment made from the impounded funds of the principal amounts due each of them pursuant to the accountings filed as reflected in footnote 3 and to previous accountings filed in these proceedings. The sole unresolved issue as to such payments is whether the State of Louisiana is entitled, as it claims, to interest upon the amount due it upon that portion of the impounded funds paid to it or, in lieu thereof, to payment for the use of those funds while they were held in the Treasury of the United States. As this issue is raised by the State's objection to the accounting of the United States for those funds, the burden is upon the State to establish its right to such payment if it is to prevail upon this issue.

Indisputably the Interim Agreement does not specifically provide for the payment of interest upon any part of the funds impounded pursuant to it. The funds are to be impounded in a separate fund in the Treasury of the United States and, upon the determination of the ownership of the lands in the disputed area, taken from the separate and impounded fund in the Treasury of the United States and paid to the parties respectively entitled to them. The State of Louisiana argues, however, that the term "impounded" necessarily implies an obligation on the part of the holder of the funds to pay interest thereon. With this we cannot agree.

Strangely enough, there seems to be no generally accepted definition of the term "impound" as applied to

funds. Aside from its general application to the containment of cattle or water, standard dictionaries define it as "to seize and retain in legal custody." Black's and Bouvier's law dictionaries adopt a similar definition, as does Kohler's "A Dictionary for Accountants." Nowhere is there any reference to any obligation on the part of the holder other than to hold the property and deliver it intact.

The State of Louisiana insists, however, that the term "impounded in a separate fund" is equivalent to "hold in escrow". In support of this position it cites Act 38 of the 1956 Louisiana Legislature (the authority under which Louisiana became a party to the Interim Agreement) which authorizes designated agents of the State to "negotiate and enter into agreements or stipulations for and on behalf of the State with the United States respecting the deposit in escrow or impounding" of sums derived from oil leases in the disputed area. In this statute, it argues, the terms "deposit in escrow" and "impounding" are used synonymously. The language, however, is equally subject to the interpretation that they are alternatives.

The State also relies upon certain language in Exhibit C to the Interim Agreement (headed "Draft of Agreement Between State of Louisiana and Operators or Lessees in Disputed Area") where reference is made to "an impounded or escrowed fund." Here, too, the language would appear to be alternative rather than merely repetitious.

There is, therefore, at least an ambiguity as to the meaning of the term "impounded" as used in the Interim Agreement. Under these circumstances, it is proper to look to the intent and understanding of the parties at the time the agreement was entered into in order to determine the meaning of the term as used therein.

It is apparent that during the negotiations which led up to the Interim Agreement, representatives of both parties used the term "escrow" rather freely and loosely. This makes it all the more significant that in the instrument finally executed that term nowhere appears. At a meeting of the negotiators on July 2-3, 1956, the State's representatives proposed an arrangement under which funds derived from oil leases in the disputed area would be held by a third party. This the United States rejected out of hand, insisting that those funds should be held by it during the interim period, as was finally agreed. If the funds were to be handled identically in either case, there would seem to be little point in this insistence. Actually under Sec. 7 of the Outer Continental Shelf Lands Act (43 U.S.C. 1336), the negotiators for the United States, unlike those for Louisiana, had no specific authority to enter into a third party escrow agreement, but only agreements respecting "payment and impounding of rents, royalties, and other sums" derived from mineral leases on disputed areas.

The only purpose of the State in arguing that the Interim Agreement in fact provided for an escrow arrangement is to support its contention that such an arrangement is a fiduciary relationship and creates a trust, and that there is an obligation upon a trustee holding such funds to invest them in income producing property, and that if he does not do so he is liable for interest thereon. This proposition is at least dubious, as ordinarily the very purpose of a trust is to produce income, while that of an escrow account is merely to assure delivery of the escrowed property intact. But admitting *arguendo* that in the absence of a contrary understanding there is such an obligation upon an escrow holder, the evidence in this case clearly negatives any such understanding upon the part

of the parties to the Interim Agreement. The single negotiator for the United States who testified stated that the question of interest was never discussed (Swarth Dep. pp. 7-8). This was confirmed by the negotiators for Louisiana who testified, two of whom very candidly stated that the reason was that they knew that the United States would not enter into the agreement if a provision for the payment of interest was incorporated in it (Tr. pp. 70, 95, 98, 99, 102, 103, 163). Under these circumstances, the deliberate omission of a provision for the payment of interest from the Interim Agreement amounts to an understanding that it would not be paid.

In any event, the United States could not pay interest upon funds held by it without statutory authority, a fact which the negotiators would be presumed to know. The State seeks to find such authority in 31 U.S.C. 547(a), which provides that "All funds held in trust by the United States, and the annual interest accruing thereon, when not otherwise required by treaty, shall be invested in stocks of the United States, bearing a rate of interest not less than 5 per centum per annum." It would be stretching the meaning and intent of this statute beyond permissible limits to say that it applies to the present situation. The funds here involved are not "funds held in trust by the United States" within the meaning of this statute, nor does the statute authorize the payment of interest.

Louisiana also argues that the authority granted under Sec. 7 of the Outer Continental Shelf Lands Act to "impound" funds carries with it the authority to agree to pay interest upon such impounded funds, and cites the negotiations leading up to an agreement between the State of California and the United States in support of this position. Even if this is correct, it necessarily follows that there is no authority under this act to pay interest in the absence

of such an agreement, and Louisiana's knowledge of the California negotiations establishes that it was well aware of this fact.

Further evidence of such awareness is evidenced by the resolution adopted by the Louisiana legislature on June 6, 1967 (Concurrent Resolution No. 251) which contains the following provisions:

> ". . . WHEREAS, the said revenues and royalties have for a number of years been impounded by the Federal Government and are presently being held in an 'escrow' fund, and
>
> "WHEREAS, the Federal Government has not invested the said revenues and royalties and has refused to invest the said funds even though the state of Louisiana has made official request that the funds be invested, and
>
> * * *
>
> "Be it Further Resolved that the Legislature of Louisiana does here' y respectfully request and urge the above named officials to take such steps as are necessary to effect a prudent and effective investment of the funds now and hereafter so impounded, with a view to increasing the increment deriving both to the Federal Government and to the State of Louisiana."

It will be noted that the language of this resolution is precatory and not demanding. In fact, the State of Louisiana apparently never took the position that it was entitled as a matter of right to interest upon or payment for the use of its share of the impounded funds until it filed its objections to the accounting of the United States for those funds.

Mr. John Carlock of the Treasury Department replied to the resolution on behalf of the United States in a letter directed to the Governor of the State of Louisiana dated July 14, 1967, in which he said:

> "In response to the request that the funds be invested by the United States, I must inform you that the Treasury Department is not able to make investments in the absence of a statutory authority."

Apparently at the time the State of Louisiana accepted this explanation, as it made no protest. However, it now takes the position that the United States did have statutory authority to agree to invest impounded funds under Section 7 of the Outer Continental Shelf Lands Act (43 U.S.C. 1336) as interpreted in the California situation. However, it is clear that the United States never entered into any such agreement, nor was it requested to do so; and in the absence of such agreement, it had no obligation to invest the impounded funds held by it. There is therefore no factual basis for holding it liable for the payment of interest upon that portion of the impounded funds held by it and now adjudged to belong to the State of Louisiana.

But aside from the question of interest, the State of Louisiana claims that the United States had access to and therefore the use of, and in fact did use, the impounded funds, including that part ultimately adjudged to belong to the State, during the period of impoundment, and therefore should be liable to the State for the value of the use of those funds, on the theory of unjust enrichment, constructive trust, restitution, or quasi-contract. All of these are equitable remedies, and there is therefore some doubt as to whether they would apply as against the sovereign. However, even assuming that they would, they are inappropriate to the factual situation here presented.

There is no dispute as to what was actually done with funds received by the United States resulting from mineral leases in the disputed area. This is perhaps best stated in the United States Response to Louisiana's First Request for Admissions filed December 13, 1976:

> "The United States admits that the cash representing revenues from disputed lands, received by the United States pursuant to the Interim Agreement of October 12, 1956 (1) was deposited in the Federal Reserve Bank, New Orleans, a number of other banks designated as Federal depositories for the United States Treasury, and the office of the United States Treasury, Washington, D.C. and (2) became part of the general account of the Treasury of the United States."
>
> "The United States admits that the actual cash representing revenues from disputed lands, then deposited in the general account of the Treasury of the United States, was immediately available to meet any authorized cash needs of the Government whatsoever."
>
> "The United States admits that the actual cash deposited in the general account of the Treasury of the United States, including cash representing revenues from disputed lands, is subject to disbursement by checks drawn on the United States Treasury by Government disbursing officers in order to make payment of Government obligations as authorized by law."

It does not follow, however, that the United States breached the terms of the Interim Agreement. That agreement provides that (with exclusions not here material) "the United States agrees to *impound in a separate fund in the Treasury of the United States a sum equal to* all bonuses, rentals, royalties and other payments" derived

from leases in the disputed area (Emphasis supplied). There is no requirement that the identity of the actual payments received be maintained; the agreement requires only the maintenance of a fund equal to those payments. And this fund is to remain in the custody of the Treasury of the United States, as was in fact done. The State's position rests entirely therefore on the phrase "impounded in a special fund," which the State claims that the United States did not do, but on the contrary used the funds for its own purpose, the value of which use the State now claims that it is entitled to recover.

The United States, on the other hand, insists that it did all that was required of it under the agreement. This consisted, as the undisputed proof shows, of establishing in August, 1956, a special deposit fund account (14X6709) on the books of the Treasury, which was periodically audited and reports thereof made to the State of Louisiana. Although this account was established in accordance with accepted government procedures prior to the execution of the Interim Agreement, this appears to be immaterial if it in fact conformed to the requirements of that agreement.

An "account", according to Kohler's "A Dictionary for Accountants", is "A formal record of a particular type of transaction expressed in money or other unit of measurement and kept in a ledger." A "fund", according to this same authority, is, in government accounting, "A self-balancing group of accounts—asset, liability, revenue, and expense—relating to specific sources and uses of capital and revenue." The special deposit fund account (14X6709) appears to come within these definitions. The amount of money on deposit with the Treasury was at all times adequate to pay in full any award to Louisiana out of the impounded fund up to the full amount of that fund. Nor did the United States have the unrestricted use of this

fund, for the full amount of it was always carried as a potential liability to the State of Louisiana on the deposit fund liability account (14X6709), and no part of it was therefore ever available to the United States for appropriation for purposes other than disbursement under the Interim Agreement pursuant to the "applicable determination" of the Court. Nor is Louisiana's "velocity of turnover" evidence material upon this issue; there is no requirement under the Interim Agreement that the United States retain the actual revenues paid to it resulting from mineral leases in the disputed area, but only "a sum equal to" the amount of those revenues. This it did.

The proof shows that the funds impounded under the Interim Agreement were handled in exactly the same way as similar funds had been handled in the past, and that representatives of Louisiana were fully aware of this fact. They knew of the manner that similar funds derived from mineral leases off the California coast had been handled. They knew of the way in which the impounded funds in which they had an interest were being handled as they received periodic reports. They made no objection, and when they made a request that the method of handling the funds be altered and that request was denied, they made no protest. It can only be assumed that they accepted this method of handling those funds as proper under the Interim Agreement. And they made no request for modification of the agreement in this respect.

Louisiana also makes the argument that the United States had an obligation to account for any profits which it realized from the use of the impounded funds as a joint venture. Suffice to say on this point that the proof does not show any profits so derived which require such an accounting, nor does the relationship between the State and the United States have any of the characteristics of a joint venture.

From all of the above it appears that the United States has fulfilled its obligations under the Interim Agreement and under the Supplemental Decree of June 16, 1975 by filing the accountings heretofore made pursuant thereto and paying to the State of Louisiana the amounts called for thereby, and it has no further obligation under that agreement or that decree, either by way of interest or payment for the use of Louisiana's money. It recognized income from leases within the disputed area as its source of revenue. It acknowledged such payments to the State of Louisiana as the Court might decree as a liability. This seems to be all that was required by the language of the Interim Agreement.

This agreement, however, also requires that this fund be maintained "intact". Obviously this does not mean that the actual dollars received from oil leases in the disputed area should retain their identity, else why specify "a sum equal to" the amount of those dollars; it means that the fund itself should be held intact, in that no liabilities should be charged against it except as provided in the Interim Agreement. The applicable provision of the agreement is as follows:

> "Payment of impounded funds hereunder shall be made in full within seventy-five (75) days after the date of the applicable determination, unless by agreement of the parties a later date is specified."

The "applicable determination" is the Court's decree of June 16, 1975 (422 U.S. 13) and payment has now been made out of the impounded fund in accordance therewith and with the Interim Agreement. At no time was the ability of the United States to perform its obligations under the Interim Agreement impaired. No other liabilities have ever been charged against the special deposit fund account (14X6709) and no other payments made out

of the fund for which it accounts. No provision for such payment is contained in the Interim Agreement, nor is such payment ordered by the Supplemental Decree (422 U.S. 13). Nor is there any Act of Congress authorizing any such payment. Therefore the United States has no further obligations beyond those it has performed.

Second Issue

Does Louisiana have the obligation to account for revenues received by it from mineral leases on areas lying within Zone 1?[4]

This issue is raised by objection by the United States to Louisiana's accounting for unimpounded funds filed pursuant to Par. 6(a) of the Decree of June 16, 1975 (422 U.S. 13). The burden of persuasion is therefore upon the United States. The position of the United States is that certain areas lying within Zone 1 having now been adjudicated to belong to the United States, the State of Louisiana is now obligated to account for and pay over to the United States all revenues realized by the State from mineral leases upon any part of those areas from June 3, 1950 (the date fixed for accounting by Decree of December 11, 1950 [340 U.S. 899]).

This would certainly be the case in the absence of any adjudication or agreement between the parties to the contrary. The State of Louisiana insists, however, that by the Interim Agreement of October 12, 1956 the United States waived any claim to revenues derived from mineral leases upon areas ultimately adjudicated as belonging to it and lying within Zone 1, and that any such waiver contained in that agreement was specifically validated by

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4. While this is the third issue listed in the Pre-Trial Order of May 26, 1976, in the interest of orderly procedure it will be dealt with here as the second issue.

Par. 13 of the Decree of June 16, 1975 (422 U.S. 13). It is with this argument that we must concern ourselves.

The Interim Agreement cites as authority for the United States' participation therein Section 7 of the Outer Continental Shelf Lands Act (43 U.S.C. 1336), which provides in part that the United States acting through the Secretary of the Interior with the concurrence of the Attorney General may "enter into agreements with the State, its political subdivision or grantee or a lessee thereof respecting operations under existing mineral leases and payment and impounding of rents, royalties, and other sums payable thereunder." The Act then goes on to say:

> "Payment made pursuant to such agreement, or pursuant to any stipulation between the United States and a State, shall be considered as compliance with section 1335(a)(4) of this title."

The subsection of 43 U.S.C. 1335 referred to provides that "any mineral lease covering submerged lands of the Outer Continental Shelf issued by any State (including any extension, renewal or replacement thereof heretofore granted pursuant to such lease or under the laws of such State)" shall be subject to validation if "all rents, royalties and other sums payable" thereunder "are paid to the Secretary" (of the Interior). Thus payments made to a State pursuant to an agreement between it and the United States made under authority of Section 7 of the Outer Continental Shelf Lands Act are equivalent to payments made to the Secretary of the Interior and thus to the United States.

The only remaining question then is whether payments made to the State of Louisiana prior to entry of the Decree of June 16, 1975 (422 U.S. 13) under mineral leases covering areas lying in Zone 1 as defined in the Interim Agreement come within the meaning and operation of

this Act. The Interim Agreement contains no specific language regarding payments derived from mineral leases on areas lying within Zone 1 and Zone 4, although it does specifically provide that revenues derived from such leases on areas lying within Zones 2 and 3 (which are referred to as the "disputed area") shall be impounded. And it contains the following provision (Paragraph 6):

> "Notwithstanding any adverse claims by the other party hereto, the State of Louisiana as to any area in Zone No. 1, and the United States as to any area in Zone No. 4, shall have exclusive supervision and administration, and may issue new leases and authorize the drilling of new wells and other operations without notice to or obtaining the consent of the other party."

Pursuant to this provision, the State of Louisiana did in fact collect and retain rentals on mineral leases on areas lying within Zone 1 and the United States did so on those areas lying within Zone 4. Neither party questioned the other's right to do so, and so it is apparent that both considered that the right to "exclusive supervision and administration" included the right to collect and retain those rentals. Payments to the State pursuant to the Interim Agreement were therefore authorized under Section 7 of the Outer Continental Shelf Lands Act of 1953 (43 U.S.C. 1336) and under Section 6 thereof (43 U.S.C. 1335) are equivalent to payments to the United States and therefore are not now recoverable by it.

The Court recognized the validity of the Interim Agreement in its decree of June 16, 1975 (422 U.S. 13), saying in Paragraph 13 thereof:

> "Nor shall anything in this Decree prejudice or modify the rights and obligations under any contracts or agreements, not inconsistent with this Decree, be-

tween the parties or between a party and a third party, especially, but not limited to, the Interim Agreement of October 12, 1956, as amended, which Agreement remains in effect except as explicitly modified hereby."

The only other explicit references in the decree to the Interim Agreement are in Paragraphs 2, 4, 5, and 7, all of which deal with funds "now held impounded" (or, in Paragraph 7, "heretofore impounded"). While it is true that Paragraph 7 requires the State to account for "any and all other sums of money derived by the State of Louisiana since June 5, 1950, either by sale, leasing, licensing, exploitation or otherwise from or on account of any of the lands, minerals or resources described in Paragraph 1 hereof" (those lying more than three geographical miles seaward of the base line as established by the decree) the only payment called for under that paragraph is that, in the absence of objections, "the party whose obligation to the other party is shown by such accounts to be the greater shall forthwith pay to the other party the net balance so shown to be due"; and that if there are objections, then any undisputed balance shall be so paid. This can hardly be considered an explicit modification of the Interim Agreement.

Louisiana apparently anticipated the possibility that some portions of the areas in Zone 1 upon which it granted leases (as it was specifically authorized to do under the Interim Agreement) might ultimately be adjudged to belong to the United States, as it inserted in all of those leases except two a provision that it was leasing the right to extract minerals only from those parts of the described areas "belonging to the State of Louisiana" or such as were "owned by the State of Louisiana." Whether this language gives rise to a claim by the United States against

the lessees is not now before the Special Master for consideration, but it does tend to negative any claim by the United States against the State of Louisiana.

The purpose of the Interim Agreement was clearly to settle the rights of the parties to the extent that this could be done pending final determination by the Court. Under it, Louisiana was given "exclusive supervision and administration" over all areas lying within Zone 1, and this was recognized by both parties to include the right to collect rents from mineral leases in that zone and to expend the funds so collected without impoundment. This agreement remained in full force and effect until the entry of the decree of June 16, 1975,[5] under which its terms were validated except as therein explicitly modified, therefore the State is entitled to keep all rentals derived prior to the entry of that decree from mineral leases upon areas lying within that zone, and the United States has no right to recover them.

Third Issue

Does Louisiana have the obligation to account for as unimpounded funds and to pay to the United States money collected by it as severance taxes on minerals removed from areas subsequently determined to belong to the United States?

Here again the issue is raised by objection by the United States to Louisiana's unimpounded fund accounting,

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5. The provision of the Interim Agreement itself as to termination is as follows:

> "This stipulation and agreement shall terminate as to any area, upon the final settlement or determination of the aforesaid controversy with respect to such area; and *thereafter* the successful party shall have exclusive jurisdiction and control over the area so determined to be owned by it to the extent fixed by the decision in the final adjudication." (Emphasis supplied)

and therefore the burden of persuasion is upon the United States. Ordinarily when a tax is illegally assessed and collected, the right of recovery thereof is with the payor. But the United States insists that the so-called "severance tax" collected by Louisiana in this case (pursuant to La. Const. Art. X, Sec. 21; La. Rev. Stat. 47:631-636) was not in fact a tax but a form of additional royalty. It bases this position upon the fact that the tax is immediately related to the minerals extracted and is a kind of substitute for the loss of a public asset. It argues that where it has been determined that the area from which the minerals were extracted lies beyond the taxing jurisdiction of the State, the amount of the tax should go to the sovereign having a right to impose it.

This argument appears, however, to be without merit. The Louisiana severance tax is not a substitute for the loss of a public asset, as it is imposed upon minerals extracted from privately owned areas within the State as well as those which are publicly owned. The fact that it is immediately related to the minerals extracted is not significant, as many taxes are so measured. The Louisiana severance tax has all of the characteristics of a true tax, and if it was wrongfully assessed and collected, then it is up to those who paid it to seek redress.

Par. 6(a) of the Decree of June 16, 1975 (422 U.S. 13) requires the State to account for "any and all other sums of money derived by the State of Louisiana since June 5, 1950, either by sale, leasing, licensing, exploitation or otherwise from or on account of any of the lands, minerals or resources" adjudged to belong to the United States. This language was clearly intended to apply to proprietary revenues, not taxes. If the Louisiana severance tax is a true tax, as indicated above, and not an additional royalty, then it does not come within it.

The United States argues, however, that as it has under Sec. 6(a)(9) of the Outer Continental Shelf Lands Act of 1953 (43 U.S.C. 1336) collected on minerals extracted from areas within Zones 2 and 3 now adjudged to belong to the State of Louisiana "a sum of money equal to the amount of the severance - - - taxes which would have been payable on such production to the State issuing the lease under its laws as they existed on the effective date of this Act," which sums have now been paid over to the State, it is only equitable that the State should now pay to the United States the amount collected by it as severance tax upon minerals extracted from areas now adjudged to belong to the United States. This, however, does not necessarily follow. These collections by the United States were admittedly not in the form of taxes but of additional revenues, and as such they were impounded under the Interim Agreement and disbursed as a part of the impounded funds pursuant thereto. In this they differ materially from the severance taxes collected by the State of Louisiana. It may be that the United States has a claim for additional royalties against the lessees of areas adjudged to it on which no previous collections under Sec. 6(a)(9) of the Outer Continental Shelf Lands Act of 1953 (43 U.S.C. 1336) have been made, but if so, it must look to those lessees for that additional payment, not to the State of Louisiana.

SUPPLEMENTARY

A preliminary draft of this report has been submitted to counsel for both parties and, without of course concurring in the conclusion in every case, a number of suggestions have been made as to the form of specific findings of fact, some of which have been adopted in this final report.

In this respect and in many others counsel have been most helpful. In addition, the State of Louisiana has requested additional findings of fact, which request along with the Special Master's ruling thereon, is attached as an appendix to this report.

RECOMMENDATIONS

For the foregoing reasons, the Special Master recommends that all objections to the amended and corrected accountings filed by each of the parties be overruled, and those accountings be approved as filed.

Respectfully submitted,

WALTER P. ARMSTRONG, JR.
Special Master

August 27, 1979

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 9, Original

UNITED STATES OF AMERICA,
Plaintiff,

vs.

STATE OF LOUISIANA, ET AL.,
Defendant.

MOTION OF THE STATE OF LOUISIANA TO HAVE THE SPECIAL MASTER MAKE ADDITIONAL FINDINGS OF FACTS TO BE INCLUDED IN A SUPPLEMENTAL REPORT TO THE UNITED STATES SUPREME COURT

MAY IT PLEASE THE SPECIAL MASTER:

The State of Louisiana, appearing herein through undersigned counsel, respectfully moves that additional findings of facts be included in the supplemental report to be filed with the United States Supreme Court as follows:

I.

Louisiana's Claim for the Increment that Should Have Been Earned on the Share of Louisiana's Money Held Under the Interim Agreement of October 12, 1956

1. The agreement between the State of California and the United States to impound funds referred to by the United States took place prior to the enactment of

the Submerged Lands Act and the Outer Continental Shelf Lands Act in 1953. (U.S. Exh. 43 and 44; La. Exh. No. 1 - LPI No. 2)

2. After the passage of the Outer Continental Shelf Lands Act, Mr. J. Lee Rankin, Assistant Attorney General of the United States, sent to California a proposed stipulation which contained the following provision:

> "The United States may invest and reinvest any of the funds covered by this paragraph in obligations of the United States Government, and all interest received, as well as any increase or decrease in the value of the investments, shall accrue to or be charged against said fund as the case may be." (La. Exh. No. 9 - LPI #166)

This was followed by a letter referring to the proposed stipulation in which Mr. Rankin said:

> "This draft contained authority for the United States to invest the funds held by it." (La. Exh. No. 9 - LPI #167)

Louisiana was not advised as to Mr. Rankin's letter at the time the Interim Agreement was entered into in 1956 and only learned of the letter during the trial of this phase of the case. (Tr. 800)

3. The United States admitted that Louisiana and the United States could amend the 1956 Interim Agreement to impose on the United States a requirement to invest the funds or pay interest on the funds. (p. 3, Post-Trial Brief of the United States on the "Interest Issue")

4. Both houses of the Legislature of the State of Louisiana passed Concurrent Resolution No. 251 on June 6, 1967, containing the following provision:

> "Be it Further Resolved that the Legislature of Louisiana does hereby respectfully request and urge the above named officials to *take such steps as are necessary to effect a prudent and effective investment* of the funds now and hereafter so impounded, *with a view to increasing the increment* deriving both to the Federal Government and to the State of Louisiana." [Emphasis added] (La. Exh. 12 - LPI #179)

The above Resolution was sent to various Government officials.

5. Instead of investing the funds, Mr. Carlock wrote a letter to Louisiana on July 14, 1967, in which he stated, on behalf of the Treasury Department, Department of Justice and other Departments of the Government, that:

> "In response to the request that the funds be invested by the United States, I must inform you that the Treasury Department is not able to make investments in the absence of statutory authority." (U.S. Exh. #51)

6. Mr. George S. Swarth, an attorney, the only Federal negotiator to testify, admitted that the holding of the impounded fund by the Treasury was a fiduciary responsibility. (Dep. Tr. 9)

7. All new drilling and leasing for oil and gas in the disputed zone in the Gulf of Mexico off the coast of Louisiana was enjoined in 1956 by the United States Supreme Court on the application of the United States, except by agreement between the United States and the State of Louisiana. (*United States v. Louisiana,* 351 U.S. 978)

8. Enjoining the drilling and leasing for oil and gas off the coast of Louisiana had a severe economic impact

on the coastal parishes of Louisiana. Under these circumstances, the Interim Agreement of October 12, 1956 was entered into to permit the United States and Louisiana to resume the drilling and leasing for oil and gas in the Gulf of Mexico off the coast of Louisiana. (See preamble to La. Act 38 of 1956, La. Ex. I - LPI #3; Tr. 62-64; Tr. 108-112; Tr. 158; Tr. 112-117)

9. In June of 1956, before commencement of the negotiations for the Interim Agreement, the United States Department of Justice interpreted the word "impounding" under Section 7 of the Outer Continental Shelf Lands Act to mean "hold in escrow" by the filing in the United States Supreme Court of a Memorandum for the United States on the Maintenance of Status Quo, which contained the following representation on behalf of the Federal Government:

> "The United States stands ready and willing to enter into an agreement with Louisiana to hold all proceeds of leasing in the disputed area in *escrow* pending a determination of the case on its merits." [Emphasis added] (No. 15 Original, *United States v. Louisiana*, June 1956)

10. During the negotiations for the Interim Agreement, the Federal negotiators represented to Louisiana that the money from the disputed area would be held in escrow. (La. Exh. No. 1 - LPI Nos. 38, 39 and 40; Tr. 50-54)

11. Subsequent to the execution of the Interim Agreement, the interpretation that the impoundment provisions of the Interim Agreement meant escrow was repeatedly confirmed by Federal officials. (La. Exh. No. 1 - LPI Nos. 20, 21, 22, 23 and 45; Tr. 206, 208, 210)

12. Mr. Arnold Petty, Assistant Director of Administration for the Bureau of Land Management, agreed with the characterization of the Interim Agreement as "in effect our escrow agreement." (Tr. 444)

13. Dr. John Haslem, expert witness for the United States, gave his opinion that the Federal Government treated the account under the impoundment provisions of the Interim Agreement in the same manner as a bank would treat an escrow account. (Tr. 836)

14. The Pre-Trial Order dated May 26, 1976, fixing the issues to be heard by the Special Master, approved as to form by the United States and Louisiana and signed by the Special Master, provided:

> "*Issue No. 1*: Whether the United States is obligated to account for the value of the use of the state's share of the *escrow fund* or for interest on the fund." [Emphasis added]

15. United States' officials represented to California that the identical deposit fund account used subsequently in this case was in the nature of a trust. (La. Exh. No. 1 - LPI Nos. 152, 153, 154 and 155; Dep. Tr. 39; La. Exh. No. 9 - LPI No. 161/U.S. Exh. No. 47 with attachment)

16. The *Dictionary for Accountants* by Eric T. Kohler defines "impound" to mean "to seize and hold in protective custody . . . cash and other assets." (Tr. 281 and 311)

17. Mr. Jerry Walker, expert witness for Louisiana, testified that the requirement in the Interim Agreement that the revenues from the disputed area be "held intact" required that the money be invested after a reasonable length of time. (La. Exh. No. 1 - LPI No. 49; Tr. 260-266; Tr. 900-901; Tr. 256-257)

18. The deposit fund account 14X6709 is a liability account, which is a bookkeeping tabulation of the potential liability of the United States and has nothing to do with the holding or use of the money from the disputed area required to be impounded under the Interim Agreement. (Tr. 221-222, 227, 296-297, 311-312, 347-348, 893-894, 890-892 and 398-399)

19. The negotiators for both parties to the Interim Agreement contemplated that the Agreement would exist for only a short period of time of either six months or one year. (La. Exh. No. 1 - LPI No. 6 at p. 11; Tr. 125-126)

20. Louisiana negotiators were not aware of the manner in which the United States had handled the funds derived from mineral leases off of the California coast nor with the details of the negotiations leading up to the execution of the 1947 and 1951 stipulations between California and the United States. (U.S. Exh. No. 67; Dep. Tr. 15; Tr. 27, 92-93, 106-107, 153 and 654)

II.

Louisiana's Claim that the Federal Government Should Account for its Unjust Enrichment Resulting from the Unauthorized Use of Louisiana's Share of the Revenues from the Disputed Area

21. The United States used Louisiana's share of the money required to be impounded under the Interim Agreement without any compensation to Louisiana. (Responses by the United States to Louisiana's First Request for Admissions, Nos. 1, 2 and 3; La. Exh. No. 1 - LPI Nos. 41 and 42; Tr. 187; Response by United States to Interrogatory No. 8 of Louisiana's First Set of Interrogatories; Tr. 200-202; La. Exh. No. 1 - LPI Nos. 19, 20, 21 and 22; Tr. 198; Tr. 213-216; La. Exh. No. 1 - LPI No. 48;

Tr. 217-218; La. Exh. No. II - LPI Nos. 182-183; Tr. 904-909)

22. The United States benefited from the use of Louisiana's share of the money required to be impounded under the Interim Agreement to the extent that such use reduced its borrowing needs. (La. Exh. No. II - LPI No. 184: Tr. 908-914)

23. The free use by the United States of the money required to be impounded under the Interim Agreement was not authorized by the Interim Agreement, and there was no agreement that the United States need not account to Louisiana for any share of the value of the benefit received from the use of the money required to be impounded. (La. Exh. No. 1; LPI No. 1; Tr. 55, 129, 136; 98;99)

24. No one ever advised the Louisiana negotiators that the United States intended to use for its own purposes, and without compensation to Louisiana, the money required to be impounded by the Interim Agreement. (Tr. 163-164; 175)

25. There was no agreement that the United States need not invest the money. (Swarth Dep. Tr. 7-8; Tr. 57; 77)

26. There was no agreement or understanding that the United States need not pay interest. (Swarth Dep. Tr. 7-8; Tr. 70-71; 102-103; 136; 163-164)

27. The amount of the benefit received by the United States in savings through the use of Louisiana's share of the money required to be impounded pursuant to the Interim Agreement in lieu of borrowing is ascertainable with reasonable certainty and amounts to approximately $88 million. (Tr. 306-308)

28. The United States admitted that there was approximately $300 million still being held by the United States under authority of the 1956 Interim Agreement. (Tr. 481)

29. Louisiana requested the Special Master to order the United States to hold such funds to pay Louisiana's claim for the use of Louisiana's money in the event the Master or the Court made such an award. (Tr. 480-482)

III.

The Special Master is a finder of fact. Therefore, it is extremely important in presenting this matter to the United States Supreme Court that the Court have additional findings of facts by the Special Master from the evidence, to be included in the Master's Supplemental Report or in an addendum thereto.

Submitted this 18th day of June, 1979.

For the State of Louisiana

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By: /s/ Oliver P. Stockwell
Oliver P. Stockwell

PROOF OF SERVICE

The undersigned certifies that copies of the foregoing Motion of the State of Louisiana to Have the Special Master Make Additional Findings of Facts to be Included in a Supplemental Report to the United States Supreme Court have been properly served on the 18th day of June, 1979, by mailing copies, sufficient postage prepaid, to the Solicitor General and the Attorney General of the United States, Department of Justice, Washington, D. C. 20530.

/s/ Booth Kellough
Booth Kellough
Special Assistant Attorney General

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 9, Original

UNITED STATES OF AMERICA,
Plaintiff,

vs.

STATE OF LOUISIANA, ET AL.,
Defendant.

ORDER ON MOTION OF THE STATE OF LOUISIANA TO HAVE THE SPECIAL MASTER MAKE ADDITIONAL FINDINGS OF FACT TO BE INCLUDED IN A SUPPLEMENTAL REPORT TO THE UNITED STATES SUPREME COURT

Request No. 1 asks the Special Master to find as a fact that the Interim Agreement of October 12, 1956 between the United States and Louisiana providing for the impoundment of certain funds (hereinafter "Interim Agreement") was executed prior to the enactment of the Submerged Lands Act and the Outer Continental Shelf Lands Act. The date of execution of the instrument in question is apparent on its face. The date of enactment of the two Acts is a matter of which the Court can take judicial notice. There appears to be no dispute upon either point. Therefore there is no necessity for such a finding. This request is therefore denied.

Requests Nos. 2, 4, and 5 ask the Special Master to make findings of fact as to the contents of certain documents which were introduced in evidence during the hearings. The quotations from these documents given in the requests appear to be correct, as well as the statements regarding their preparation, delivery and receipt; however no finding to this effect is required, as the documents speak for themselves. The inferences to be drawn from these documents have already been dealt with in the Special Master's report to the extent necessary, the omission of any reference to them indicating that in his opinion they were not contrary to his holdings as there set forth. These requests are therefore denied.

Request No. 3 asks the Special Master to make a finding of fact based upon a statement contained in the Post-Trial Brief of the United States. This would not be proper as such findings must be based upon the evidence either testimonial or documentary, presented during the course of the hearings, or upon the technical record, and therefore this request is denied.

Requests Nos. 6, 12, 13, 17, and 28 ask the Special Master to find that certain testimony was given by particular witnesses during the course of the hearings before him. The summary of the testimony as given in the requests appears to be correct. However, it is not the function of the Special Master to make findings of fact upon such matters (which are apparent from the record) but upon the ultimate factual issues in the case. Therefore these requests are denied.

Request No. 7 asks the Special Master to make a finding of fact in regard to a decree entered by the U. S. Supreme Court which is a matter of record (351 U.S. 978). This is unnecessary and therefore this request is denied.

Request No. 8 correctly states the facts, but in the opinion of the Special Master those facts are immaterial to the decision of any issue pertinent to the case. The request is therefore denied.

Request No. 9 apparently asks the Special Master to make a finding of fact based upon a memorandum filed in a case not before him. It is therefore denied.

Requests Nos. 10 and 11 ask the Special Master to find that the term "escrow" was frequently used by representatives of the United States both before and after the execution of the Interim Agreement in referring to the manner in which the funds required under it to be impounded would be handled. This appears to be correct; however this fact does not alter the terms of the agreement itself and is therefore in the opinion of the Special Master immaterial. (See Report p. 7). These requests are therefore denied.

Request No. 14 asks the Special Master to make a finding of fact as to the wording of a Pre-Trial Order approved by counsel and entered in the case. As this order is a part of the record, such finding is unnecessary. As to its effect, that is dealt with in Note 2 to the Special Master's report. This request is therefore denied.

Request No. 15 asks the Special Master to make a finding of fact as to certain representations alleged to have been made by representatives of the United States to the State of California in connection with an account maintained by the United States in which that state had an interest. Even if true, this is in the opinion of the Special Master immaterial, and therefore the request is denied.

Request No. 16 asks the Special Master to make a finding of fact as to a definition given in a standard dic-

tionary of accounting. Although the definition as quoted in part is correctly given, this is unnecessary as this is a matter of which the Court can take judicial notice. This request is therefore denied.

Request No. 18 has to do with deposit fund account 14X6709. This has already been dealt with fully in the Special Master's Report (See pp. 12-14). This request is therefore denied.

Request No. 19 asks the Special Master to find that both parties contemplated that the Interim Agreement would be in effect for only a short term. Even if true, this is in the opinion of the Special Master immaterial. This request is therefore denied.

Request No. 20 asks the Special Master to find that the negotiators for the State of Louisiana were not aware of certain negotiations between the United States and the State of California. Whether or not the negotiators were aware of their precedent, the State of Louisiana was charged with such knowledge. The Special Master's Report so finds (p. 13), and such a finding is supported by the evidence. (U.S. Exs. 67, 75, 76, 83) This request is therefore denied.

Special Requests Nos. 21 and 22 ask the Special Master to find that the United States used money impounded under the Interim Agreement ultimately adjudged to belong to the State of Louisiana and benefitted thereby. This has been dealt with adequately in the Special Master's Report (pp. 10-13) and in the opinion of the Special Master no further findings upon this point are necessary. The requests are therefore denied.

Requests Nos. 23, 24, 25 and 26 ask the Special Master to make negative findings, that certain matters were not agreed to by the parties or discussed between their repre-

sentatives. While it appears to be true that these matters were not discussed, the inference to be drawn therefrom has already been considered in the Special Master's Report (pp. 7-8) and nothing further is required. Therefore these requests are denied.

Request No. 27 asks the Special Master to find that the amount of the benefit derived by the United States from the use of funds impounded under the Interim Agreement and ultimately adjudged to belong to the State of Louisiana is ascertainable with reasonable certainty and to fix that amount. In view of the Special Master's finding that the United States is not accountable for any such benefits, if in fact there were any, such a finding is immaterial and unnecessary, and this request is therefore denied.

Request No. 29 asks the Special Master to find that he was requested to order the United States to hold certain funds pending the outcome of this litigation. No formal motion for such an order appears in the record, and had there been such, it would have had to be denied as being beyond the scope of the reference to the Special Master (423 U.S. 909). This request is therefore denied.

Although all of Louisiana's requests for additional findings of fact are denied for the reasons given, Louisiana is entitled to have the benefit of its requests therefor and the Special Master's rulings thereon in seeking review of the Special Master's Report to the United States Supreme Court. Louisiana's Motion and this Order will therefore constitute an Appendix to the Special Master's Report as filed with that Court.

/s/ Walter P. Armstrong, Jr.
Special Master

ENTERED: 7/18/79